SUNMUGAM SUBRAMANIAM

v.

JG CONTAINERS (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R3-25-73-1998]
17 FEBRUARY 2000

LABOUR LAW: *Industrial Court - Decision - Whether finding of guilt on only one out of seven charges sufficient to hold that dismissal of employee was with just cause and excuse - Whether Industrial Court failed to take into account other material facts*

LABOUR LAW: *Employment - Dismissal - Employee's dismissal on a single charge of misconduct - Whether justified*

LABOUR LAW: *Employment - Dismissal - Alleged misconduct - Use of vulgar language at company's social lunch - Whether dismissal justified*

LABOUR LAW: *Industrial Court - Award - Correction - Industrial Relations Act 1967, s. 30(9) - Whether correction was in fact a variation of award - Whether s. 30(9) meant only for clerical oversights*

The applicant, a quality control manager, was dismissed by the 1st respondent ('the company'). The matter was referred to the Industrial Court. Although there were seven charges preferred against the applicant, the Industrial Court held that the applicant was guilty of only the 1st charge, *ie*, that the applicant had used derogatory language on the managing director of the company, an expatriate, at a social lunch. Notwithstanding that, the Industrial Court held that the applicant's dismissal was with just cause and excuse. Hence, the instant application by the applicant for the orders of *certiorari* and *mandamus*.

The applicant claimed that the participants at the said lunch were actually invited to voice their grievances at the said lunch. As such, the Industrial Court was wrong in law when it decided that the applicant committed a misconduct when he had only voiced his views about the benefits given to expatriate workers. Apart from this, it was claimed that the corrective award handed down by the Industrial Court was not proper as it was more of a variation than a correction under s. 30(9) of the Industrial Relations Act 1967.

Held:

[1] The company relied on seven charges against the applicant as reasons for his dismissal. However, only one charge was held to be proved and that too being the least serious one. The Industrial Court failed to give due consideration to the fact that the company could only prove a small part of its case. The more serious allegations remained unproven. Instead the Industrial Court proved additional reasons which were not relied on by the company in arriving at its decision.

[2] There was simply no misconduct in raising grievances, let alone misconduct grave enough to warrant dismissal. The issue of grievances was in fact used to justify the dismissal although the company itself had chosen not to depend on it. The Industrial Court therefore amalgamated the 1st charge with the "grievance" issue to form the basis of the reason given to uphold the dismissal. That was in breach of the law as set out in the case of *Goon Kwee Phoy*. Further, the said decision was not in accordance with equity and good conscience.

[3] If the company considered the applicant's act of voicing his grievances as amounting to misconduct, then action should have been taken against the personal manager as he had invited those present at the lunch to air their grievances. The Industrial Court failed to consider that very relevant point which contributed to the irrationality of its decision.

[4] Conversation at a social lunch cannot be taken to be conduct amounting to a repudiation of the contract of employment. If that decision was allowed to stand, employees would be barred from voicing their views for fear of reprisal.

[5] The Industrial Court failed to take into consideration that the company did not call the managing director, who made the decision to dismiss the applicant, as a witness. It is a principle of industrial law that the person who decides to dismiss must be called as a witness.

[6] The facts showed that the charges against the applicant were an afterthought engineered to be a basis for dismissal. In equity and good conscience, the Industrial Court should have arrived at a finding that the dismissal was *mala fides*. The decision of the Industrial Court was thus irrational and perverse.

[7] In arriving at the finding that the applicant was guilty of the 1st charge, the Industrial Court took into account statements made by one Arul at the domestic inquiry, who was not produced as a witness in the Industrial Court. The Industrial Court's assumption that since the

applicant did not examine Arul, his statements must be true was ill-founded. That was because at the domestic inquiry the applicant did not have the benefit of a legal counsel. A workman would not have knowledge as to how to conduct an inquiry. He would not know that failure to cross-examine could lead to the witness statement being taken at face value. As such, the Industrial Court committed an error in law in arriving at its decision.

[8] The Industrial Court failed to consider whether the proven misconduct in the 1st charge alone constituted just cause or excuse for the dismissal. Also, the Industrial Court failed to address its mind as regards the harshness or severity of the punishment. Thus, the Industrial Court had committed a jurisdictional error of law.

[9] As the applicant was found guilty of one charge out of the seven charges that made up the basis of the applicant's dismissal by the company, the Industrial Court failed to apply the doctrine of proportionality. Thus, the Industrial Court erred in law in dismissing the applicant's claim.

[10] The applicant's dismissal on a single charge of misconduct, namely the use of vulgar language, did not warrant the extreme penalty of dismissal.

[11] The Industrial Court failed to take into account and give due weight to the following material facts: (i) that the lunch at which the alleged misconduct took place was informal; (ii) that the managing director upon whom the foul language was used was not present at the said lunch; and (iii) that the applicant had served 21 years with the company without any record of prior misconduct. Thus, the Industrial Court failed to consider the reasonableness of the Company's decision to dismiss the applicant.

[12] There was a delay of seven days from the date the lunch was held to the date the charges were preferred against the applicant. The delay was a factor that the Industrial Court should have considered in deciding whether there was a misconduct, and whether if there was misconduct, it was serious enough to warrant dismissal. The delay would have meant that the doctrine of condonation would apply. The Industrial Court has consistently applied this doctrine in its decisions but in this instance, it failed to apply the same. That was an error of law.

[13] It was clear that the Industrial Court's decision was perverse. The decision was not properly reasoned. The court failed to consider several relevant matters and took into consideration several irrelevant matters. The award thus suffered from irrationality or "Wednesbury unreasonableness".

[14] The Industrial Court went beyond merely correcting a clerical mistake when it handed down the corrective award dated 15 June 1998 under s. 30(9). Section 30(9) is not meant for a variation of awards. It is meant only for clerical slips. The court had in fact formed an incorrect view of the facts in arriving at its decision which it sought to amend in the corrective award.

[15] On the facts of the case, to remit this matter back to the Industrial Court would mean prolonging the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demanded that to avoid further delay and expense, the court should determine the consequential relief rather than remit the case to the Industrial Court for that purpose.

[15a] It would not be in the interest of the employer or the employee if the court were to order reinstatement with full backwages. The appropriate remedy was to grant him compensation for loss of employment.

[Compensation in the sum of RM489,800 to be paid.]

Case(s) referred to:

Azman Abdullah v. Ketua Polis Negara [1997] 1 CLJ 257 ***(refd)***

Chartered Bank v. National Union of Bank Employees [1983] 2 ILR 111 ***(refd)***

Chartered Bank, Penang v. National Union of Bank Employees [1983] 2 ILR 349 ***(refd)***

Cygal Bhd. v. Issam Abdul Rahman [1998] 3 ILR 44 ***(refd)***

District Council, Amraoti v. Vithal Vinyak AIR [1941] Nagpur 125 ***(refd)***

Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 1 MLJ 129 ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 1 MLJ 417 ***(refd)***

Hepburn v. Department of Justice [1998] 81 IR 32 ***(refd)***

JG Containers (M) Sdn Bhd v. Sunmungam Subramaniam [1998] 2 ILR 574 ***(refd)***

Johnson Matthey Metals Ltd v. Harding [1978] IRIR 248 ***(refd)***

Jupiter General Insurance Co Ltd v. Ardeshir Bomanji Shroff [1937] 3 All ER 37 ***(refd)***

LW Middleton v. H Playfair AIR [1925] Calcutta 87 ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 ***(refd)***

National Union of Hotel, Bar and Restaurant Workers v. Hotel Jaya Puri [1981] MLLR 270 ***(refd)***

Phillips v. Foxall (2872) LR Vol VII 666 ***(refd)***

R. Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 145 ***(refd)***

Ranjit Thakur v. Union of India and Others [1988] SCC (L&S) 1 ***(refd)***

RM Parmar v. Gujarat Electricity Board [1983] 1 LLJ 261 ***(refd)***
Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union [1990] 1 MLJ 5 ***(refd)***
Syed Khader Mohiuddin v. The Chairman, TN Public Service Commission and Another [1997] 77 FLR 694 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***
Taylor v. Parsons Peebles Nei Bruce Peebles Ltd [1981] IRIR 119 ***(refd)***
Vasant Tukaram Mandavkar v. Life Insurance Corporation of India & Others [1998] III LLJ (Supp) 599 ***(refd)***

Legislation referred to:
Federal Constitution, art. 8(1)
Industrial Relations Act 1967, s. 30(9)

Indian Constitution, arts. 14, 226

For the applicant - KC Wong; M/s P Kuppusamy & Co
For the respondent - A Gomez; M/s Gomez & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

This is an application for orders of *certiorari* and *mandamus* in respect of Industrial Court Award *JG Containers (M) Sdn Bhd v. Sunmungam Subramaniam* [1998] 2 ILR 574 dated 8 June 1998. The facts of the case are as follows: The applicant commenced employment with the first respondent ("the company") in January 1974 as a leading hand with a salary of RM1 an hour. His last held position was quality control manager, with a monthly salary of RM3,250. In a letter dated 15 April 1995 the company made several allegations against the applicant (see p. 24 of the cause bundle). A reply to these allegations was sought from the applicant. The applicant replied by a letter dated 24 April 1995 (see p. 26 of the cause bundle). He denied the charges. In a letter dated 28 April 1995 the company preferred additional charges against the applicant. The charges were of a completely different nature. The applicant was charged with bribery. An explanation was sought from the applicant. In a letter dated 3 May 1995 the applicant denied the charges. He stated that the charges were malicious and baseless. In a letter dated 12 May 1995 the company preferred seven charges against the applicant (see p. 30 of the cause bundle). The first charge was that the applicant had used derogatory language on the company's expatriates, specifically the managing director of the company. The remaining six charges were bribery charges. Subsequent to a domestic inquiry held on 19 May 1995, the applicant

was dismissed through a letter dated 29 June 1998 (see p. 33 of the cause bundle). The matter was then referred to the Industrial Court to be adjudicated upon. The court held that the applicant was guilty of only the first charge. The applicant was found not guilty of the other six charges. (see p. 141 of the cause bundle). Notwithstanding this, however, the Industrial Court dismissed the applicant's claim. Hence this application. The first charge reads as follows:

> That you on the 8th day of April 1995, at about 5.00 p.m. at Restaurant Yee Kee (Shah Alam) Sdn. Bhd., Lot 1248, Bukit Kamuning, Batu 8, Jalan Kampung Jawa, Klang, Selangor while having organized official lunch for the incoming work site committe members with our Company's Management staff, you being a Management staff, used abusive and derogatory language on the expatriates and particularly the Managing Director to wit by calling him "PONDAI MAVAN", "CHIUNNI PAYAL", and thereby you have committed an act of major misconduct.

The function of the Industrial Court in dismissal cases is stated by Mohd. Azmi, FCJ in the case of *Milan Auto Sdn. Bhd. v. Wong Seh Yen* [1995] 4 CLJ 449 at pp. 454-455 of the report:

> As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance Sdn. Bhd.* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.

Harun Hashim, president of the Industrial Court and judge (as he then was) in the case of *Chartered Bank, Penang v. National Union of Bank Employees* [1983] 2 ILR 349 held at p. 351:

> It is duty of the Court to first establish whether the employer has proved the allegation of misconduct. The Court in this case did so find. Where misconduct has been proved, the Court has next consider whether the punishment imposed by the employer is justified.

In the case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 MLJ 145, Eusoff Chin, CJ at p. 176:

> What are the functions of the Industrial Court? We need only refer to three authorities.
>
> In *Goon Kwee Phoy & Ors. v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 at p. 136, Raja Azlan Shah CJM (as then was) held:

> ... Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse.

The same learned judge held in *Hotel Malaya Sdn. Bhd. & Anor. v. National Union of Hotel Bar and Restaurant Workers* [1982] 2 MLJ 237 at p 240:

> .... Its functions comprise an investigation of the facts, and lastly the application of the law to those findings.

In *L Michael & Anor. v. M/s. Johnson Pumps India Ltd.* [1974] 1 LLJ 262 at p 268, the Supreme Court of India held:

> The tribunal has the power and, indeed the duty to X-ray the [termination] order and discover its true nature, if the object and effect, if the attendant circumstances and the ulterior purpose to dismiss the Employee is because he is an evil to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simpliciter, such action is bad and is liable to be set aside.

The grounds on which the impugned award is challenged are found in encl. No. 2 (see p. 7, cause bundle).

The Industrial Court Failed To Take Into Account Relevant Facts

Ground (c)

The Industrial Court failed to take into consideration the relevant fact that the first respondent failed to prove the reasons that it relied on in dismissing the applicant, as required in *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 MLJ 129.

According to *Goon Kwee Phoy*, the duty of the Industrial Court is to determine whether the reasons relied on by the company have been proved. Failure to prove the reason means that the dismissal was without just cause or excuse. At p. 136 Raja Azlan Shah (CJ (Malaya) as DYMM then was):

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employers or find one for it.

In this instant case the company relied on seven charges against the applicant as reasons for his dismissal. However, only one charge was held to be proved and that too being the least serious one. The Industrial Court failed to give due consideration to the fact the company could only prove a small part of its case. The more serious allegations remain unproven. Instead the Industrial Court provided additional reasons which were not relied on by the company in arriving at its decision. This is evident from p. 10 of the award (see p. 142 of the cause bundle):

> Even if, but only if, the D.I. was accepted as not properly conducted, which is denied, the Court did not find anything convincing from what the Claimant had explained in the Court. He only gave bare denial. He, as a Manager occupying a management position in the Company, should know where to bring those issues as the lunch was not only held informally but the Union or the Management were not properly represented. The claimant should at least bring the issues with the Managing Director or with the management of the Company but not at the lunch held socially. Furthermore, neither the local managers who attended the lunch or the Union has asked him to be their spokesman.

The first charge only related to the allegation of the use of foul language. There was no allegation concerning the raising of the grievances by the applicant. The company must have realised that simply raising grievances cannot constitute grounds to dismiss the applicant. There was simply no misconduct in raising grievances, let alone misconduct grave enough to warrant dismissal. Notwithstanding this the Industrial Court went back to the issue about the grievances. This issue, in fact, was used to justify the dismissal although the company itself had chosen not to depend on it. The Industrial Court therefore amalgamated the first charge with the 'grievance' issue to form the basis of the reason given to uphold the dismissal. This is in breach of the law as set out in the case of *Goon Kwee Phoy*. Further, the said decision is not in accordance with equity and good conscience. The court itself stated that a dismissal would be set aside if there were *mala fides*, victimisation or unfair labour practice, and yet the court failed to see the abundant amount of evidence on victimisation, *mala fides* and unfair labour practice. The applicant was dismissed because of his personal views. The expatriates, especially the managing director obviously did not like the fact that the applicant raised the issue of unequal benefits as evinced by CL2 (see p. 24 of the cause bundle). The chairman failed to draw the proper inferences from the facts. The finding was with respect, perverse.

In the case of *Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, the Supreme Court held at p. 206:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences

from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor* where in dealing with the question of unreasonableness I alluded (at pp. 129-130) to Lord Diplock's exegesis in *Bromley Borough Council v. Greater London Council & Anor* (at p 821) in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps to amiss to refer in this context to Dunn LJ's assertion in *Reg v. Secretary of State for the Home Department, ex p Asif Mahmood Khan* (at p 1352) that 'the categories of unreasonableness are not closed ...' Mason J said in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* (at p 310) that it might be possible to challenge a decision which has:

> Failed to give adequate weight to a relevant factor of greater importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations (or taking into account of irrelevant considerations), but that the decision is 'manifestly unreasonable' ... (A) court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

A line of cases has recently emerged which asserts a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. The first case was *Reg v. Deputy Industrial Injuries Commissioner, ex p Moore I* in which Diplock LJ stated (at p 488) that natural justice requires decision-makers to base their decisions 'upon material which tend logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event which would be relevant. It means that (the decision-maker) must not spin a coin or consult an astrologer ...' *Ex p Moore* has been approved in Australia in *Minister of Immigration and Ethnic Affairs v. Pochi* (at pp. 688-690) per Deane J.

Under ground (c), the award suffers from infirmity on the ground of "irrationality".

Ground (e)

In deciding that the applicant's dismissal was with just cause and excuse the Industrial Court failed to take into consideration the fact that the applicant was invited to voice his views by Mr. Sharma. It is observed that the Industrial Court was wrong in taking into account the issue of the benefits given to the expatriates. It should be observed that the participants at the lunch were actually invited to voice their grievances and view by one Mr. Sharma, the

personnel manager of the company in 1995. Mr. Sharma originally appeared as a witness at the Industrial Court (COW9). However, the court was later informed that he had left the company and could not be found. His evidence (in examination-in-chief) was expunged as the applicant's counsel could not cross-examine him (see p. 30, affidavit tambahan Shanker a/l Subramaniam). The applicant testified that the personnel manager, Mr. Sharma, invited those present to voice their grievances. The applicant explained this in CL3 (at p. 26 of the cause bundle). Mr. Sharma did not deny this in writing. This fact therefore remained unrebutted by the company. If the company considered the applicant's act of voicing his grievances as amounting to a misconduct, why was no action taken against Mr. Sharma? I am of the view that the chairman failed to consider this very relevant point in the award. The chairman's omission here contributed to the irrationality of his decision.

Ground (f)

The Industrial Court arrived at a decision that was wrong in law when it decided that the applicant committed a misconduct when he voiced his views about the benefits given to expatriate workers because the said discussion took place at an informal lunch.

As observed earlier the issue of misconduct did not arise in respect of the 'benefits' issue. The lunch was informal (see p. 142 of cause bundle). Conversation at a social lunch cannot be taken to be conduct amounting to a repudiation of the contract of employment. If this decision was allowed to stand, employees would be barred from voicing their views for fear of reprisal.

Ground (i)

The Industrial Court failed to take into consideration the fact that the first respondent failed to call Mr. SC Gupta, who made the decision to dismiss the applicant, as a witness.

The person who preferred the charges against the applicant and who took the decision to dismiss him, was the managing director, M.S.C. Gupta. He was an expatriate. The applicant testified that he had raised his grievances with Mr. Gupta prior to the dismissal. Mr. Gupta therefore had an ulterior motive in dismissing the applicant. The applicant testified that on 15 August 1995 Mr. Gupta offered him three months' salary to resign. When the applicant refused, the charges were brought against him. The company did not call Mr. Gupta as a witness. It is a principle of industrial law that the person who decides to dismiss must be called as a witness. The failure to call him meant that the applicant could not cross-examine him on several relevant matters. The chairman in this instant case did not address this point in the award. In the case of *Cygal Bhd. v. Issam Abdul Rahman* [1998] 3 ILR 44 the Industrial Court held at p. 48:

Although the company tried to prove that the termination letter relied only on the absence of the claimant as the reason for terminating the claimant's service the court believed that it did so after receiving the claimant's solicitors' letter. Although the company's letter was dated 16 July and did not refer to the solicitors' letter the company only posted the letter on 21 July as evidenced by the post mark on the envelope (Exh. C118). The company's executive director who dismissed the claimant was not called as a witness to enlighten the court what was the real reason why the claimant was dismissed. In the case of *Tetracon Engineeing Sdn. Bhd. v. Abdul Latif Chek Mat* [1997] 1 ILR 31 cited by learned counsel for the claimant the learned chairman said:

> The Court agrees with the claimant's submission that the director who made the decision to dismiss the claimant, one Rahguram should have been called. His evidence as to the actual reason for the claimant's dismissal is crucial since he is the dismissing authority. The Court is left with the evidence of COW1 who does not even have personal knowledge of the events.

The court agrees that the evidence of the dismissing authority would have assisted the court in determining the real reason for the claimant's dismissal. In the absence of the testimony of the executive director of the company the court is justified in the circumstances of the case to conclude that it dismissed the claimant not because of the two or three days absence but because of the claimant's objection to performing both the functions of the post of senior project engineer and resident engineer of the project.

Since the Industrial Court found the claimant not guilty of six charges, would the claimant have been dismissed for the first charge alone? Only the managing director could have answered this question.

Ground (j)

The Industrial Court failed to take into consideration the relevant fact that S.C. Gupta informed the applicant orally on 15 August 1995 that the applicant would be dismissed, and tried to persuade the applicant to receive three months' salary and resign. The charges against the applicant were only made after the applicant refused to accept S.C. Gupta's suggestion.

The failure to call Mr. Gupta as a witness leaves the applicant's testimony as uncontroverted. When the applicant refused to accept the money, he was informed that he was dismissed. By exh. CL3 (see p. 26 of cause bundle) the applicant clearly stated that he maintained that he was already dismissed by Mr. Gupta on 15 April 1995, that is, before the charges were preferred. The company did not deny this. This fact was unrebutted. The chairman did not consider this in the award. The fact showed that the charges against the applicant were an after thought, engineered to be a basis for dismissal. In equity and good conscience, the Industrial Court should have arrived at a

finding that the dismissal was *mala fides*. The decision of the court was thus irrational and perverse.

The Industrial Court took into consideration irrelevant facts

Ground (d)

In arriving at the decision that the applicant was guilty of charge no.1 the Industrial Court took into consideration an irrelevant fact when it considered the evidence of a witness who attended the domestic inquiry which was conducted by the first respondent, although the said witness was not called as a witness at the Industrial Court.

In arriving at the finding that the applicant was guilty of charge no. 1 the chairman took into account statements made by one Arul at the domestic inquiry. This Arul was not produced as a witness in the Industrial Court. The Industrial Court asked itself an irrelevant question, that is, why did the applicant not cross-examine Arul at the domestic inquiry (see p. 141 of cause bundle). At the domestic inquiry the applicant did not have the benefit of legal counsel. A workman would not have knowledge as to how to conduct an inquiry. He would not know that failure to cross-examine could lead to the witness statement being taken at face value. The Industrial Court's assumption that since the applicant did not cross-examine Arul, his (Arul's) statements must be true, was ill-founded.

Again, the Industrial Court committed an error of law in arriving at its decision.

Ground (h)

The Industrial Court failed to take into account the relevant fact that in the charge letter dated 12 May 1995 the first respondent did not make any allegation about the applicant's views about the benefits given to expatriates. Therefore the Industrial Court took into account an irrelevant matter when it considered the applicant's views about benefits given to expatriates when arriving at the decision that the applicant was guilty of charge No. 1.

The Industrial Court failed to consider whether the proven misconduct in the first charge above constitutes just cause or excuse for dismissal. In this instant case the chairman failed in its duty on the second limb of the *Milan Auto* test that is the Industrial Court failed to consider whether the proven misconduct in the first charge alone constitutes just cause or excuse for the dismissal.

Ground (a)

In arriving at its decision that the applicant's dismissal was with just cause and excuse, the Industrial Court failed to take into consideration the relevant fact that the company failed to prove six out of the seven charges for the company to dismiss the applicant.

In the case of *Hepburn v. Department of Justice* [1998] 81 IR 32 the Federal Court of Australia, in considering the appropriateness of the penalty of dismissal, held at p. 39:

> I have had regard to the whole of the evidence, and have sadly come to the conclusion that the decision to dismiss Ms Hepburn was not based on a genuine consideration of the circumstances of her case and of a penalty appropriate to those circumstances. The decision to terminate her employment was made in order to avoid the embarrassment in this case which the Department of Justice had experienced in the *Heather Parker* case. The word "sadly" earlier in this paragraph is intended to reflect my view that the unfair way Ms Hepburn was treated was motivated by a deep desire on behalf of the Tribunal members that the department not be the subject of criticism, to the extent that a rational and objective consideration of Ms. Hepburn's breach of discipline, and whether it justified dismissal, was never given.
>
> The evidence before me establishes serious deficiencies in the decision-making process. The nature of the relationship in question, the absence of actual harm to discipline or prison security, the low level of any potential for harm in the circumstances of the case, the good work record and personal qualities of the applicant, the nature and extent of the consequences to her of dismissal, the desirability of parity or equality of treatment with other disciplinary breaches in the prison system, were each given no or scant genuine consideration.

Further at p. 44 of the report Mr. Justice Spender went on to hold:

> There is a lot of wisdom in the pithy statement that the punishment must fit the crime. The notion of equal justice, the idea that unequal treatment under the law is unfair, is a deep-seated tenet of our community. It is reflected in the criminal law, but it is by no means only confined to crime. Mason J in *Lowe v. The Queen* [1984] 154 CLR 606 said at 610-611:
>
> > Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of

> abiding importance to the administration of justice and to the community. And it is against this background that the present application for special leave to appeal – one which reveals exceptionally glaring example of discrepancy in punishment – has to be considered.

In the Indian case of *Vasant Tukaram Mandavkar v. Life Insurance Corporation of India & Others* [1998] III LLJ (Supp) 599 the High Court of Bombay held at p. 602:

> Assuming, for a moment, that there was some evidence and charges 1 and 3 could be held proved against the Petitioner, even then, in my view the dismissal order issued to the Petitioner was harsh and disproportionate punishment. There appears to be no careful application of mind to the facts and circumstances, including the past record of the Petitioner, before the Order of Dismissal was imposed. Even in the second Show Cause Notice proposing the punishment of dismissal, there is no reference to the past record of the Petitioner, nor is there any application of mind to the past record of the Petitioner even in the Order of dismissal passed against the Petitioner.

It is instructive to note that the useful guidelines in the matter of inflicting punishment particularly the punishment of discharge or dismissal found in the case of *RM Parmar v. Gujarat Electricity Board* [1983] 1 LLJ 261, where M.P. Thakkar, CJ held at p. 264:

> In imposing punishment on an erring employee an enlightened approach informed with the demands of the situation and the philosophy and spirit of the times requires to be made. It cannot be a matter of the *ipse dixit* of the disciplinary authority depending on his whim or caprice.
>
> Be it administration of criminal law or the exercise of disciplinary jurisdiction in departmental proceedings, punishment is not and cannot be the 'end' in itself. Punishment for the sake of punishment cannot be the motto. Whilst deliberating upon the jurisprudential dimension the following factors must be considered:
>
> (1) In a disciplinary proceeding for an alleged fault of an employee punishment is imposed not in order to seek retribution or to give vent to feeling of wrath.
>
> (2) The main purpose of a punishment is to correct the fault of the employee concerned by making him more alert in the future and to hold out a warning to the other employees to be careful in the discharge of their duties so that they do not expose themselves to similar punishment. And the approach to be made is the approach parents make towards an erring or misguided child.
>
> (3) It is not expedient in the interest of the administration to visit every employee whom a fault is established with the penalty of dismissal and to get rid of them. It would be counter productive to do so for it would

be futile to expect to recruit employees who are so perfect that they would never commit any fault.

(4) In order not to attract the charge of arbitrariness it has to be ensured that the penalty imposed is commensurate with the magnitude of the fault. Surely one cannot rationally or justly impose the same penalty for giving a slap as one would impose for homicide.

When different categories of the penalties can be imposed in respect of the alleged fault one of which is dismissal from service, the disciplinary authority perforce is required to consult himself for selecting the most appropriate penalty from out of the range of penalties available that can be imposed, having regard to the nature, content and gravity of the default. Unless the disciplinary authority reaches the conclusion that having regard to the nature, content and magnitude of the fault committed by the employee concerned it would be absolutely unsafe to retain him in service the maximum penalty of dismissal cannot be imposed. If a lesser penalty can be imposed without seriously jeopardising the interest of the employer the disciplinary authority cannot impose the maximum penalty of dismissal from service. He is bound to ask his inner voice and rational faculty why a lesser penalty cannot be imposed.

It cannot be overlooked that by and large it is because the maximum penalty is imposed and total ruination stares one in the eyes that the employee concerned is obliged to approach the court and avail of the costly and time consuming machinery to challenge in desperation the order passed by the disciplinary authority. If a lesser penalty was imposed, he might not have been obliged to take recourse to costly legal proceedings which result in loss of public time and also result in considerable hardship and misery to the employee concerned.

When the disciplinary proceedings end in favour of the employee the employer had often to pay backwages say for about five years without being able to take work from the employee concerned. On the other hand, the employee concerned would have had to suffer economic misery and mental torture for all these years. Even the misery of being obliged to remain idle without work would constitute an unbearable burden. And when the curtain drops everyone is left with a bitter taste in the mouth. All because extreme penalty of dismissal or removal is imposed instead of a lighter one.

Every harsh order of removal from service creates bitterness and arouses a feeling of antagonism in the collective mind of the workers and gives rise to a feeling of class conflict. It does more harm than good to the employers as also to the society.

A perusal of the award would reveal that the Industrial Court in this instant case had totally failed to perform its duty in the second limb of its twofold function as set out in *Milan Auto*. In other words, the Industrial Court failed to address its mind as regards the harshness or severity of punishment. Thus,

the Industrial Court had committed a jurisdictional error of law. The award of the Industrial Court suffers from infirmity on the ground of "illegality". In the case of *Rama Chandran (supra)* Edgar Joseph Jr, FCJ held at p. 187:

> In this context, it is useful to note how Lord Diplock (at pp. 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > By illegality' as a ground for judicial review I mean that the decision-maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

Moreover, the Industrial Court erred in law in dismissing the applicant's claim because it failed to apply the doctrine of proportionality. This is couched in **Ground (b)** of this application (at p. 7, cause bundle):

(b) When arriving at its decision that the applicant's dismissal was with just cause and excuse the Industrial Court failed to take into account the doctrine of 'proportionality' because the applicant was only found guilty of one charge out of the charges that makes up the basis of the applicant's dismissal by the company. The Industrial Court failed to give consideration to the question whether the punishment meted out to the applicant was just in the light of the fact that the applicant was found guilty of one charge only.

Edgar Joseph Jr FCJ in the case of *Rama Chandran (supra)* endorsed "proportionality" as a ground for judicial review. At p. 187 and 189 he said:

> Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development. ... In *Malaysia, kin Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 1 MLJ 261, an appeal arising from the dismissal of a suit by the High Court Johor Bahru, in a case concerning a headmaster of National Type Government School, who had been dismissed from service, on the basis of a binding over order made against him, without a conviction being recorded, in respect of two offences of criminal breach of trust, in contravention of s. 409 of the Penal Code (FMS Cap 45), the severity of punishment, to wit, the dismissal from service, was in issue. The Johore Education Department had recommended that the applicant be demoted or reduced in rank. The language of the judgment of Sri Ram JCA, speaking for the majority in the Court of Appeal, did specifically sue the term 'disproportionate' when he quite correctly quashed the order of dismissal and substituted, *in lieu* thereon an order that the Employee be reduced in rank and be paid all arrears of salary and other emoluments due to him.

In this instant case the Industrial Court upheld the applicant's dismissal on a single charge of misconduct, namely the use of vulgar language. I am of the conclusion that this single act did not warrant the extreme penalty of dismissal.

The case of *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1990] 1 MLJ 5 offers assistance on what kind of misconduct would justify an order of dismissal. Idris Yusof J held that only conduct that shows that the workman is fundamentally in breach of his contract of employment would suffice. At pp. 9 and 11 of the report he said:

> I think such of disobedience can only justify dismissal if it is of a nature which goes to show that the claimants are repudiating their contracts of service or one of its essential conditions, and for that reason I think such disobedience must at least have the character of being wilful. In other words the disobedience connotes a deliberate flouting of the essential contractual conditions which element is lacking in the instant case. ... The term 'misconduct' to my mind refers to conduct so seriously in breach of the accepted practice that by standards of fairness and justice the employer should not be bound to continue the employment.

Based on the many cases of authority submitted, I come to the conclusion that the single charge upon which the applicant was found guilty was not enough to entitle the company to dismiss him. In the case of *Jupiter General Insurance Co. Ltd. v. Ardeshir Bomanji Shroff* [1937] 3 All ER 37 the Privy Council held at p. 43:

> Their Lordships recognise that the immediate dismissal of an employee is a strong measure, and they have anxiously considered the evidence with a view to determine the question whether the trial judge was right in his finding the respondent was guilty of gross negligence, which, coupled with his conduct at the interview of Dec. 21, was sufficient to justify his dismissal. On the one hand, it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, CJ was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded.

The case of *Jupiter* was followed in the case of *National Union of Hotel, Bar and Restaurant Workers v. Hotel Jaya Puri* [1981] MLLR 270 at p. 271 of the report it is stated:

> Council for the Union cited *Jupiter General Insurance Co. v. Shroff* [1937] 3 AER 67 PC. Wherein Lord Maugham, quoting Sir John Beaumont CJ.,

observed that a single outbreak of bad temper ... . Accompanied with regrettable language .... is not sufficient ground for dismissal ... in such case one must apply the standards of men not those of angels ... . He also submitted that an isolated incident did not merit the very grave punishment of dismissal. *Chantril v. Shortland Ltd.* [1995] IrLR 209 is a case in point.

In the case of *Syed Khader Mohiuddin v. The Chairman, T.N. Public Service Commission and Another* [1997] 77 FLR 694, a case concerning dismissal for using intemperate language, the Madras High Court, which is an appellate court, held at p. 700:

> In our opinion, the punishment imposed on the appellant for using intemperate language or disrespectful language is too severe in the facts and circumstances of the case. It is true that the appellant has employed knowingly or unknowingly, some sort of intemperate language, which, according to the respondents, is improper and disrespectful. We may also keep in mind that the appellant was charge-sheeted for one misconduct and found guilty for yet another misconduct, which is not the subject matter of the disciplinary proceedings. In our opinion, justice, equity and fair play demand that the punishment must always be commensurate with gravity of the offence charged. This Court, in exercising the power under Art. 226 of the Constitution of India, therefore, can examine whether the respondents while imposing the punishment for removal from service have properly approached the matter by exercising or refusing to exercise their power. Before this court can exercise the discretion, this Court has to be satisfied that the order of removal from service was not justified on the facts and circumstances of the case. As pointed out by the Supreme Court in the decision reported in *RAMA Kant Misra v. The State of U.P.*, the use of indiscreet, improper and abusive language may show lack of culture, but merely the use of such language on one occasion, unconnected with any subsequent positive action and not proceeded by any blame-worthy conduct, cannot permit an extreme penalty of removal from service.

Article 226 of the Constitution of India reads as follows:

> *[226. Power of High Courts to issue certain writs. – (1) Notwithstanding anything in Article 32, + [***], every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of *habeas corpus*, *mandamus*, prohibition, quo warranto and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

Article 8(1) of the Federal Constitution reads as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

Article 8(1) is in *pari materia* with art. 14 of the Indian Constitution which states as follows:

> **Equality before law** – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

In the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 2 CLJ 771, the Court of Appeal held at p. 795:

> In *Maneka Gandhi v. Union of India*, the Supreme Court of India explained the content and reach of art. 14 of the Indian Constitution, which is in *pari materia* with art. 8(1) of the Federal Constitution, as follows:
>
> ... Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art. 14 like a brooding omnipresence and the procedure contemplated by art. 21 must answer the test of reasonableness in order to be in conformity with art. 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of art. 21 would not be satisfied.

In the case of *Ranjit Thakur v. Union of India and Others* [1988] SCC (L&S) 1 the Supreme Court of India held that where the punishment is so strikingly disproportionate the court must correct the injustice by judicial review. At p. 11 it is stated:

> In *Bhagat v. State of Himachal Pradesh* this Court held: [SCC p. 453, SCC (L&S) p. 353, para 15]
>
> > It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution.
>
> The point to note, the emphasize is that all powers have legal limits.
>
> In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.

In the instant case, in arriving at its decision, the Industrial Court failed to take into account and give due weight to the following material facts, thereby committing a jurisdictional error of law:

(a) The lunch at which the alleged 'misconduct' took place was informal. It was not a formal company function. It was held after office hours.

(b) The managing director, upon whom the alleged vulgar language was used, was not even present at the lunch. How could the applicant be said to have been guilty of using foul language on someone when he was not even present?

(c) That the applicant had served 21 years with the company without any record of prior misconduct.

In the light of the above facts, the Industrial Court failed to consider the reasonableness of the employer's decision to dismiss. In the case of *Taylor v. Parsons Peebles Nei Bruce Peebles Ltd.* [1981] IRIR 119, it was held by the Employment Appeals Tribunal (EAT) at p. 119:

> In determining the reasonableness of an employer's decision to dismiss, the proper test is not what the policy of the employer was but what the reaction of a reasonable employer would be in the circumstances. That the employer's code of disciplinary conduct may or may not contain a provision to the effect that any one striking a blow would be instantly dismissed, therefore, is not to the point. The provision must always be considered in the light of the law it would be applied by a reasonable employer having regard to equity and the substantial merits of the case. That includes taking account of the employee's length of service and previous record.
>
> In the present case, a reasonable employer, having regard to the appellant's previous 20 years good conduct would not have applied the rigid sanction of automatic dismissal. The appeal would be allowed and the dismissal held unfair.

In *Johnson Matthey Metals Ltd. v. Harding* [1978] IRIR 248, it was held by the EAT at p. 248:

> The Industrial Tribunal had not erred in law in holding that the respondent employee had been unfairly dismissed by being found in possession of a watch belonging to a fellow employee.
>
> Although stealing must be seriously regarded, and often and perhaps normally would justify dismissal, there may well be circumstances where an Industrial Tribunal can be justified in saying that a dismissal is unfair, albeit that the employee has stolen.
>
> Stealing is no different from other examples of misbehaviour in that the gravity of it depends on the circumstances. It is impossible to lay down a general inflexible rule that treats all stealing as identical. The circumstances and surrounding facts are bound to be matters of considerable importance.

These decisions of the EAT were followed in the local case of *Chartered Bank v. National Union of Bank Employees* [1983] 2 ILR 111, where it was held at p. 121:

> In the present case, the Claimant has had more than 27 years of blameless or unblemished record of service with the Bank. He was all through in the Cash Department and at the time of dismissal he was a Senior Assistant Cashier and in charge of the Cash Department whenever the Chief Cashier was away. He maintained his integrity and honesty in the handling of hundreds of thousands of dollars in the Cash Department. In his position as a Cashier, he had ample opportunity to put his hand in the Bank's coffer but he refrained from doing so. After had completed 25 years of service, he was presented with a pair of gold cufflings in recognition of his honest and faithful service although he declined the offer. It is therefore not proper to regard him as a person who was dishonest in the discharge of his duty or who lacked fidelity and good faith.
>
> Having regard to his 27 years or more good conduct and having regard to equity, good conscience and the substantial merits of the case, we find that his dismissal was too harsh a punishment.

The Industrial Court had erred in law in that it failed to consider the reasonableness of the dismissal. On this ground of "irrationality" the Industrial Court award should be quashed.

The Industrial Court Failed To Consider The Doctrine Of Condonation

Ground (g)

The Industrial Court failed to take into consideration the relevant fact *ie*, that there was a delay of seven days from the time the lunch was held to the time the charges concerning the lunch were preferred against the applicant.

In the instant case, there was a delay of seven days from the date the lunch was held to the date the charges were preferred against the applicant.

If the applicant had committed a misconduct which was so serious as to amount to a repudiation of the contract of service, why was there a delay of seven days. Surely, if a serious misconduct had been committed, the company did not genuinely consider there to be any misconduct. A delay in taking action was a factor that the Industrial Court should have considered in deciding, first, whether there was a misconduct, and second, whether, if there was a misconduct, it was serious enough to warrant dismissal. The court totally omitted this point. It therefore failed to take into account a relevant fact. The delay would have meant that the doctrine of condonation would apply. This doctrine had been applied in the case of *Azman bin Abdullah v. Ketua Polis Negara* [1997] 1 CLJ 257. The Industrial Court has consistently applied this doctrine in its decisions, but in this instant case the chairman failed to apply the same. No consideration was even given to the delay. Thus, the Industrial Court had committed an error of law. The relevant passages on the doctrine of condonation in the case of *Azman* are found at p. 271 of the report:

The grouse of the appellant is that in view of the dates in the charges levelled against him dating from 30 October 1986 to 7 March 1990 which strongly indicated considerable delay in taking action, and telling the Public Services Department earlier in the same year namely in 1991 that there was no disciplinary proceedings against him, the respondent had either overlooked, forgiven, approved or sanctioned his wrongdoings and they were acting in bad faith when they took action against him after the appellant had made, and the police department had supported, his application for optional retirement, and after the Public Services Department had given their approval. Consequently, in condoning the offences in this manner and in imposing a punishment not commensurate with the offences, the appellant contends the decision of the police disciplinary authority was invalid and of no effect.

Learned counsel for the appellant had referred to four authorities. In *Johore Mining & Stevedoring Co. Ltd v. All Malayan Mining Industry Staff Union* [1967] 2 MLJ iii before the Industrial Arbitration Tribunal, it was held:

> Incidents prior to the incidents leading to the termination of the storekeeper's services had been waived by the company and should not be taken into account by the tribunal in its consideration of the issue as to whether or not such termination was justified.

In *District Council, Amraoti v. Vithal Vinyak AIR* [1941] Nagpur 125, the court said:

> Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. This rule is to be found in AIR (1915) Cal 87 (*L.W. Middleton v. H. Playfair* (11)) and in many other cases. The reason is obvious. A servant even though he misconducts himself has a right to seek other employment, and it is proper and just that he should be given the earliest opportunity of seeking such fresh employment. As time goes by and he grows older, his chances of obtaining employment grow less and less. Therefore the rule is that a servant must be dismissed at once or given the chance of serving upon a fresh contract. If no such terms are imposed then clearly new terms cannot be imposed at some later date after the election to condone has been made, for the simple reason that had these conditions been put forward at the time, the servant might have preferred dismissal and the opportunity of obtaining other service. That is the reason underlying the rule which, in my opinion, is a fair, just and proper one.

The relevant finding in *LW Middleton v. H Playfair AIR* [1925] Calcutta 87 was as follows:

> We have been pressed to hold on behalf of Middleton that he was constrained to act as he did, because the conduct of Playfair had seriously prejudiced the interest of the estate, and that he could have fully justified his action even if he had dispensed with his service under cl. 9 of the agreement. In our opinion, it would be fruitless to investigate whether Playfair had or had not misconducted himself so as to justify his dismissal by Middleton. If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

On the same point, the Court of Queen's Bench in *Phillips v. Foxall* (2872) LR Vol. VII 666 ruled as follows:

> Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

> As for the facts in this case, the relevant officer in the police department had explained that he had made a mistake when he told the Public Service Department that there was no disciplinary action against the appellant when he actually knew there was. When a particular disciplinary action commences is a separate issue altogether but in this case it is our view that it must begin when investigation are initiated and this must well be before the police disciplinary authority informs the person concerned the charges he has to face which in this particular instance was only by the letter dated 10 October 1991. The statement that the appellant was free of any disciplinary action was written on 26 March 1991 and from the admission of the mistake, investigations had in fact commenced by then. Although at that point of time there were no disciplinary proceedings taken against the appellant as yet, the police department was already aware of the wrongdoings of the appellant which would necessitate disciplinary action being taken. Why was nothing done since the latest date of the offences was just over a year before they made that so called appellant's request for optional retirement? The delay in taking action must surely, in these circumstances and based on the authorities, be an act of condonation. As for the punishment, however, nowhere can we find that the police disciplinary authority had acted beyond its powers but if the issue of condonation had been taken into consideration, the trial Judge's decision would surely have been the other way.

The Decision Of The Industrial Court Was Wednesbury Unreasonableness

Ground (k)

The Industrial Court's decision that the applicant's dismissal was with just cause or excuse is perverse and no other reasonable tribunal would arrive at

the said decision.

It is clear that the Industrial Court's decision is perverse. The decision is not properly reasoned. The court failed to consider several relevant matters, and took into consideration several irrelevant matters. The award thus suffers from irrationality or "*Wednesbury* unreasonableness".

In the case of *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 1 MLJ 417 the meaning of "unreasonableness" was stated at p. 422:

> The third ground is nothing more than a repetition of the second ground but in relation to all five charges and worded so as to include all the incidents of the doctrine of *ultra vires, ie,* cases of excess or lack of jurisdiction and unreasonableness in the broad sense as expounded by Lord Greene in *Wednesbury Corp*., to give the appearance of a formidable ground. What it really amounts to is that in arriving at its formidable ground. What it really amounts to is that in arriving at its conclusion and decision on the five charges the Industrial Court acted in excess of its jurisdiction or in other words *ultra vires* and therefore a nullity. Lord Reid's speech in *Anisminic v. Foreign Compensation Commission* at p. 171 is relevant:
>
> > It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.

So is Lord Greene MR's speech in *Wednesbury Corp* case at p. 229, explaining the meaning of 'unreasonableness' in its broad or comprehensive sense:

> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find

> a series of grounds set out. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.

Ground (l)

The Industrial Court handed down a corrective award dated 15 June 1998. Although termed as a correction under s. 30(9), it is actually a variation. The Industrial Court acted *ultra vires* the said section and therefore the corrective award and Award No. 284 of 1998 are null and void. (please see p. 147, cause bundle).

The relevant part of the original award reads as follows. (See p. 141 of cause bundle):

> In Court of Claimant admitted that the witness of No. 3 at the D.I. (Mr. Arunasalam s/o Maruthamuthu) was his good friend but he (Arunasalam) did not give evidence in favour of the Claimant at the D.I. but said that the Claimant was very abusive and told the Court that the Claimant, among others, said "Chunni Payal – Pondai". Arul told the Court that the Claimant should have raised any issues at the D.I. not meant for, he should not have said those 'words' at the D.I. He said it was grossly improper for the Claimant to have uttered such words in the presence of the Union members. The Claimant did not even cross-examine Mr. Arul at the D.I. Why did the Claimant keep quite at the D.I. if what Mr. Arul said about him was not true?

Section 30(9) was not meant for a variation of awards. Section 30(9) reads as follows:

> (9) The Court may rectify in any award any clerical error or mistake arising from any accidental slip or omission.

The section therefore is meant only for clerical slips. What the Industrial Court has done goes beyond merely correcting a clerical mistake.

In the original award the Industrial Court seemed to be of the view that Arul had given evidence to the court, and had told the court that the applicant should not have raised any issues concerning the expatriates benefits. This was not a mere clerical error. The court had in fact formed an incorrect view of the facts in arriving at its decision, which it sought to amend in the "corrective award". (see p. 147 of the cause bundle). The entire para. 2 at p. 9 of the award had to be deleted and a new para. 2 was substituted. The Industrial

Court therefore exceeded its jurisdiction as it became *functus officio* after handing down the impugned award. Therefore the award is erroneous in its entirety. Justice has not been served according to equity and good conscience. There can be no greater error of law in respect of an Industrial Court Award than one where it is clear that the requirements of equity and good conscience have not been met.

Eusoff Chin, CJ in the case of *Ramachandran (supra)* at pp. 169-170 said:

> Section 30(3) of the Act requires the Industrial Court to take its Award without delay and where practicable within 30 days. Here, the Employee had been without job for seven years, and the object and spirit of the Act to have industrial disputes speedily resolved in the national interest had been defeated and frustrated. The courts, therefore should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago.
>
> Based on the facts on record, this was a fit and proper case where the jurisdiction of the Court should not end with the quashing of the Award. The High Court jurisdiction should not be curtailed or narrowed or constructed by mere reference to the old historical development in which the writ of *certiorari* was developed and came to be granted by the courts in England. If the application for *certiorari* is dismissed, that ends the matter. But if the application is allowed, the Court has surely to mould the order. If it were to merely grant *certiorari* to quash the Award and nothing more, this would deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the Employee.
>
> As far as possible, the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. On the facts of the case before the court, to remit this matter back to the Industrial Court would mean prolonging the dispute, which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demanded that to avoid further delay and expense, the Court should determine the consequential relief rather than remit the case to the Industrial Court for that purpose.
>
> In the context of the facts of the case before the Court, it would not be in the interest of either the Employer or the Employee if the Court were to order reinstatement with full backwages. The Employee was now 51 years old, had been out of employment for seven years and had lost touch with his work. It was doubtful if he could fit in the society where he used to work and where he was not wanted. Under the circumstances, sending him back to the Employer would cause him more mental distress and suffering. The appropriate remedy was to grant him compensation for loss of employment. A total sum of RM489,800 was to be paid by the Employer to the Employee.

For all the foregoing reasons, order in term of (i),

(iii)(a) The applicant be reinstated to his former position as quality control manager within one month from the date of the decision without any loss of wages together with necessary adjustments, allowances, bonus, seniority, service and other benefits whatsoever;

(b) That he be paid backwages on his adjusted salary from the date of dismissal to date of reinstatement;

(c) All monetary payments due to the applicant be paid to him through his solicitors Messrs. P. Kuppusamy & Co. within one month from the date of the judgment, and

(iv) of lampiran 6 dated 24 October 1998.